Supreme Court, U.S.
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No. 99-1048

In The

Supreme Court of the United States

KANSAS STATE UNIVERSITY,

Petitioner,

v.

MARK AND GENEVIEVE INNES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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RESPONDENTS' OBJECTION TO QUESTIONS PRESENTED IN PETITIONER'S PETITION

The Respondents, according to Rule 15.2, object to Petitioner's questions presented. The questions presented are:

i. Did the Tenth Circuit err when it determined that, on the facts of this case, a general state statute coupled with a voluntary and consensual agreement between the Kansas Board of Regents and U.S.D.O.E. was a waiver of Eleventh Amendment immunity?

ii. Did the Tenth Circuit find for the Respondents on grounds of abrogation principles or on grounds of express and unequivocal intent to litigate in federal court?

iii. Did the Tenth Circuit find a constructive waiver of Eleventh Amendment immunity based on the combination of a general state statute coupled with a voluntary and consensual agreement between the Kansas Board of Regents and U.S.D.O.E.?

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REASONS TO DENY THE WRIT

I. The Tenth Circuit rendered a decision in accord with the decisions of this Court when it held that the State of Kansas through its arm and *alter ego* – the Kansas Board of Regents – waived Eleventh Amendment Immunity in this case.

Petitioner argues that the Tenth Circuit's decision in this case is contrary to *Ford Motor Co. v. Department of the Treasury of Indiana*, 323 U.S. 459 (1945), Pet. at 8. The Petitioner's argument is flawed because it ignores the analysis in *Ford* of the Indiana *general policy of the law*, Constitution, statutes and decisions when compared to the applicable Kansas general policy of the law, Constitution, statutes and decisions. *Ford* at 467. The Kansas general policy of law, Constitution, statutes and decisions are distinct from those analyzed in *Ford*.

In *Ford*, the Court reasoned, *ibid.*, that because the question whether the Attorney General had authority to waive immunity had not been determined by the Indiana court, the method of analysis used would be to "*rely on the general policy* of the state by looking at its Constitution, statutes and decisions." *Ibid.* (emphasis added) The Indiana Constitution contained a *prohibition* against *specific* waivers of immunity and allowed only a general waiver. Because the suit at issue in *Ford* required a specific waiver, and because the Indiana Attorney General had only statutory duties as opposed to common law duties, this court found no express waiver. *Id.* at 469. In the Kansas Constitution, no *prohibition* against any type of waiver of immunity exists. By inference from *Ford*, the absence of a specific prohibition was interpreted as a grant of authority for specific waiver. Pet. App. 16a.

The Tenth Circuit properly recognized the Kansas practice of addressing the Eleventh Amendment in the context of the general policy of law and specific statutes such as K.S.A. 75-611(g) and K.S.A. 39-7, 137 and logically compared that practice to the absence of a prohibition in K.S.A. 76-723.

A review of the establishment and grant(s) of authority to the Kansas State Board of Regents demonstrates that the general policy of Kansas grants broad authority and control to the Board. Establishment of the Board of Regents is mandated by the Kansas Constitution, with a broad grant of authority to control and supervise public institutions of higher education such as Kansas State University. Resp. App. 1. The Board has the *constitutional* duty to "perform such other duties as may be prescribed by law." *Ibid.* In one Kansas decision, the Kansas Supreme Court addressed the issue whether the Board's authority was statutory only, or if it had common law authority, and found common law authority. *Brown v. Wichita State University,* 217 Kan. 279, 540 P.2d 66 (1975) In *Brown,* Wichita State University was sued in tort by an individual, and it asserted that a contract, entered into by its agent, was invalid because it exceeded the *Board's* contracting authority set forth in K.S.A. 76-721. The Kansas Supreme Court held the contract valid on grounds that the University had broad authority and that the contracting procedure set forth in K.S.A. 76-721 was only directory, not mandatory. *Id.* at 289-290. Unlike the Attorney General in *Ford,* the Kansas Board of Regents is not restricted solely to its statutory duties. *Ibid.*

Petitioner argues that the Fifth Circuit's decision in *Magnolia* would stand in conflict with this case if the writ

is denied. Pet. at 8. The Petitioner's argument is flawed because it ignores the findings and facts of *Magnolia Venture Capital v. Prudential Sec.*, 151 F.3d 439 (5th Cir. 1998). In *Magnolia*, there was a state statute restricting venue to Hinds County, Mississippi. *Id.* at 442.

The Eighth Circuit decision in *Rose v. U.S.D.O.E.*, 187 F.3d 926 (8th Cir. 1999) indicates that the Eighth Circuit has found waiver in the area of bankruptcy jurisdiction by affirmative conduct. In *Rose*, the State, by its agency, filed a proof of claim in a debtor's bankruptcy action and the debtor argued waiver under the provisions of 11 U.S.C. § 106(b). The *Rose* decision is post-*Seminole* and the Eighth Circuit reasoned *that as a matter of common law*, and not according to 11 U.S.C. § 106(b), the State waived its immunity. *Id.* at 929. The Eighth Circuit, in *Rose*, expressed its view that issues of bankruptcy jurisdiction are unique. *Id.* at 930, n.8.[1]

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[1] "We note in passing, however, that bankruptcy has long been considered a special area of the law, and the Supreme Court's June 1999 rulings on sovereign immunity have not resolved how far Congressional power extends in the bankruptcy context. Federal jurisdiction over a bankruptcy estate differs from jurisdiction over a party to litigation. "A federal court's jurisdiction over the dischargeability of debt . . . 'derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over debtors and their estates.' " *Virginia ex rel. Norfolk v. Collins (In re: Collins)*, 173 F.3d 924, 929 (4th Cir. 1999) (citation omitted). The Supreme Court has distinguished the adjudication of a bankruptcy estate in which a state claims an interest from an ordinary suit against a state:

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide by the

In *Hankins v. Finnel*, 964 F.2d 853 (8th Cir. 1992), the Eighth Circuit found waiver by the Missouri Attorney General through conduct. In *Hankins*, the State argued that no express or implied authority existed in Missouri law to allow the waiver, and that only the legislature of Missouri could waive immunity. *Id.* at 855. The Eighth Circuit found waiver because, as here, the enabling statute at issue contained no prohibition against waiver. *Id.* at 857. The Eighth Circuit in *Hankins* disregarded the argument that the State Attorney General had no authority to waive immunity. The Eighth Circuit concluded that the Attorney General acted according to statutory authority and that although the Missouri legislature *expressly* declared that the statutes governing the State Legal Defense Fund did not waive immunity defense(s), it

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> consequence of that procedure. If the claimant is a State, the procedure of proof and allowance is not transmuted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is shortly speaking, an adjudication of interests in a *res*.
>
> *Gardner v. New Jersey*, 329 U.S. at 573-74, 67 S.Ct. 467 (citation omitted). Requirements of a workable bankruptcy system may also be seen to favor a centralized system. The Court has long recognized "orderly and expeditious proceedings" as a "fundamental purpose of the Bankruptcy Act," and the fragmentation of proceedings necessary to settle claims against a bankruptcy estate desserves that purpose. *Id.* at 574, 67 S.Ct. 467 (citation and internal quotations omitted)."

included no such language in the *Missouri Incarceration Reimbursement Act*. *Id.* at 859.

Petitioner argues that the Seventh Circuit decision in *Porter v. State of Illinois*, 36 F.3d 684 (7th Cir. 1994) conflicts with the decision in this case. Yet in *Porter* a state statute prohibited the waiver. *Id.* at 691. The Seventh Circuit recognized as valid the holding of *Atascadero* that immunity could be waived by the *"context of a particular federal program." Id.* at 690, *citing Atascadero, State Hospital v. Scanlon*, 473 U.S. 234, 238 n.1, 105 S.Ct. 3142, 3145 n.1, 87 L.Ed.2d 171 (1985), and relied on *Ford*. *Id.* at 690. In *Porter*, the Seventh Circuit, like the Tenth Circuit, recognized the *Atascadero* waiver of immunity in the context of a particular federal program as a valid waiver. *Id.*

In *Vargas v. Trainor*, 508 F.2d 485 (7th Cir. 1974), the Court found waiver *by the state's Attorney General* when he made certain representations in *litigation* which indicated that he intended to pay certain amounts if the district court awarded judgment. The waiver in *Vargas* did not come from the text of the Illinois Constitution, state statutes or decisions, and was found regardless of the state's prohibition, in statute, against waiver. *Id.* at 492. Further, the waiver was made by an *agent* of the state, not by the legislature or courts.

Finally, the Eleventh Circuit decision in *Silver v. Baggiano*, 804 F.2d 1211 (11th Cir. 1986) is a case where a prohibition against waiver existed in an Alabama decision. *Id.* at 1214. The Tenth Circuit's decision does not offend *Ford*, or any circuit decision cited by Petitioners in Section I of their Petition. Pet. at pp. 7-10. The writ should be denied.

II. The Tenth Circuit's Decision in this Case Does Not Conflict with This Court's Decisions Requiring Express and Unequivocal Waiver by the State.

The Tenth Circuit did not find abrogation or constructive consent by the state. Rather, the Tenth Circuit found that the state of Kansas effectuated a valid waiver of its constitutional immunity by its affirmative conduct, similar to the waiver recognized when a state participates in litigation, or files a proof of claim. Pet. App. 12a-14a, 16a-17a. The Tenth Circuit stated that:

> " . . . [w]hile this case does not present the exact language, it does contain what the language must impart – the State plainly must be on notice that by electing to participate in this federally funded program, it accepts affirmative obligations to pursue or defend claims in federal court on the merits." Pet. App. 13a.

The Tenth Circuit, in this case, was not considering whether Congress unequivocally expressed abrogation, or applied the *Parden* doctrine of constructive consent, but whether the State of Kansas had given unequivocal consent to suit in Federal Court. *See, Parden v. Terminal Railway of the Alabama State Docks Dept.*, 377 U.S. 184 (1964). Express consent is first set forth in the contract of the parties which explicitly states that KSU agrees to *perform* the functions and activities set forth in 34 C.F.R. § 674. Pet. App. 12a.

After this case was decided by the Tenth Circuit, the Eighth Circuit handed down *Rosebud Sioux Tribe v. Val-U Construction*, 50 F.3d 560 (8th Cir. 1995). In *Rosebud*, an Indian Tribe entered a contract to arbitrate and then attempted to rely on Eleventh Amendment immunity to

escape the consequences of the contract when the award in arbitration was confirmed by a federal court. The Eighth Circuit found that *the contract* expressed an unequivocal intent to waive immunity by the agreement to arbitrate. *Id.* at 562.

Petitioner's overly strict interpretation of the method used by the court to analyze Eleventh Amendment waiver confuses the strict standard of waiver with an overly strict method of analysis. Such a strict method of analysis has not been the method used by this court. *See, Port-Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990) (disapproving a strict method of finding non-waiver because the waiver was stated in the *venue* section of the State statute). Because this is not an abrogation case, but one of waiver by unequivocal consent, the Tenth Circuit's decision did not address whether *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996) was applicable. Pet. App. 4a n.1.[2]

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[2] "Because neither the bankruptcy court nor the district court relied on § 106(b) of the Bankruptcy Code, we do not address in this case whether it is constitutional. *See, e.g., Sacred Heart Hosp. of Norristown v. Pennsylvania (In re Sacred Heart Hosp. of Norristown)*, 133 F.3d 237, 243-45 (3d Cir. 1998) (holding 11 U.S.C. § 106(a) unconstitutional to the extent that it purports to abrogate Eleventh Amendment immunity); *Department of Transp. & Dev. v. PNL Asset Management Co. (In re Estate of Fernandez)*, 123 F.3d 241, 244-46 (5th Cir.) (holding attempted statutory waiver of sovereign immunity under § 106(a) unconstitutional and listing similar cases), *amended by* 130 F.3d 1138 (5th Cir. 1997); *cf. Schlossberg v. Maryland (In re Creative Goldsmiths of Wash., D.C., Inc.)*, 119 F.3d 1140, 1147 (4th Cir. 1997) (holding that § 106(a) & (b) offend the Eleventh Amendment), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1517 (1998). *But cf. Wyoming Dep't of Transp. v. Straight (In re Straight)*, 143 F.3d 1387, 1392

The Petitioner would have this court construe *Seminole* so that even if a state voluntarily and knowingly enters a contract agreeing to litigate in federal court, nevertheless *Seminole* invalidates that contract. Such is simply not the law, because while *Seminole* held that Congress cannot abrogate a State's immunity – *unilaterally* in Article I – it did not abolish the concept of express or unequivocal waiver by the State through a showing of its affirmative intention to litigate in federal court. *See, Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

III. The Tenth Circuit's Decision Did Not Rely on Constructive Waiver.

Petitioner argues that the Tenth Circuit's decision in this case controvenes the holding in *College Savings Bank v. Florida Pre-Paid Post Secondary Education Expense Board*, 144 L.Ed. 2d 605, 119 S.Ct. 2119 (1999) which overturned *Parden. Id.* at 184.

As stated, *supra*, in Section II of this brief, the Tenth Circuit's decision is not founded on Congress' unilateral imposition of federal law in an area where it cannot validly abrogate. *Parden* is a constructive consent case arising from principles of abrogation. In *Parden*, the individual plaintiffs sued the State for injuries arising from work on a state owned railroad. The applicable federal law, in *Parden*, was FELA which is enacted under the Commerce Clause. In *Parden*, no contract existed and no

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(10th Cir. 1998) (holding that 11 U.S.C. § 106(b) is unaffected by *Seminole Tribe*), *cert. denied*, ___ U.S. ___, 119 S.Ct. 446 (1998)."

affirmative consensual act existed to indicate the State's intention to litigate in federal court. The state's consent could be constructed by a reference to common carriers in interstate commerce. *Id.* at 242. The *Parden* facts are a "far cry" from the facts at hand because no affirmative action of the state served as the basis to "construct" the consent. *Id.*

College Savings was decided in 1999, and the federal law at issue was a 1946 law prohibiting false advertising enacted under Article I power. This Court in *College Savings* reaffirmed that the state could still voluntarily waive immunity, relying on *Gunter v. Atlantic Coast Line*, 200 U.S. 273, 284 (1906), *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944), and *Beers v. Arkansas*, 20 HOW 527, 529, 15 L.Ed. 991 (1858) ("we have held that a state may, absent any contractual commitment to the contrary, alter the conditions of its waiver and apply those changes to a pending lawsuit.") *College, Id.* at 616.

In *College*, the *Parden Constructive Consent Doctrine* was overruled because it required an assumption that simply because a state was in a certain field, also occupied by the federal government, it had waived immunity. *Id.* at 618. *Parden* has no applicability to this case.

CONCLUSION

For the foregoing reasons, Respondents Mark and Genevieve Innes respectfully request that this Court deny *Certiorari*.

Respectfully submitted,

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